In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 6160

JOHN ARTHUR BOYD,

Appellant,

vs.

FINCH R. ARCHER, Warden of the United States Penitentiary at McNeil Island, Washington,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE EDWARD E. CUSHMAN, *Judge*

BRIEF OF APPELLEE

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STATEMENT OF THE CASE

Appellant Boyd was sentenced in the United States District Court for the Western District of Washington in Cause No. 11630 on the 27th day of February, 1928, for conspiracy to violate the Prohibition Act, to a term of fifteen months in the United States Penitentiary at McNeil Island, and to pay a fine of $1,000. (Tr. 7-8) In pursuance of said judgment and sentence a commitment was issued (Tr. 5) in said Cause No. 11630 in which commitment we find a provision to the effect that the defendant be imprisoned until his fine is paid or until he be discharged according to law. (Tr. 6) The last provision mentioned in the commitment is not to be found in the sentence. The United States Marshal for the Western District of Washington filed his return on said commitment, certifying that he received the same on the 7th day of March, 1929, and that in obedience thereto, and on the 15th day of March, 1929, he committed the defendant Boyd as requested and directed in said commitment. (Tr. 7)

In Cause No. 40011, in the United States District Court for the Western District of Washington, Northern Division, defendant Boyd was, on the 15th day of

March, 1929, sentenced to serve a term in the penitentiary at McNeil Island of fifteen months for conspiracy to violate the Tariff Act and the National Prohibition Act, with the further provision in said sentence in Cause No. 40011 as follows:

> "Said term of imprisonment to run consecutively with and not concurrently with, and in addition to the sentence heretofore imposed in a former cause." (Tr. 10)

Pursuant to said judgment and sentence a commitment was issued directing the Marshal to deliver the body of defendant Boyd to the warden at McNeil Island Penitentiary pursuant to the aforesaid judgment and sentence in Cause No. 40011, and we find in said commitment the following pertinent provision which was not included in the judgment and sentence:

> "or in such other prison as may be hereafter provided for the confinement of persons convicted of offenses against the laws of the United States, for the period of fifteen months, to run consecutively with and in addition to sentence imposed in Cause No. 11630, at hard labor, from and after this date." (Tr. 13)

The Marshal's return of service on said commitment in Cause No. 40011, wherein he certifies that in obedience to said commitment he delivered Boyd to the penitentiary at McNeil Island on the 15th day of

March, 1929, will be found on page 14 of the transcript herein.

In 1923 in the United States District Court for the District of Oregon one J. A. Boyd, upon a plea of guilty to a charge of violation of Section 39 of the Criminal Code, was sentenced to the United States Penitentiary at McNeil Island for a term of two years. (Tr. 15-16) The commitment in pursuance of the sentence of the United States District Court for the District of Oregon will be found on page 17 of the transcript herein, and the Marshal's certification of the fact that he delivered J. A. Boyd to the Federal prison at McNeil Island on July 26, 1923, in conformity with with said commitment, as aforesaid, will be found on page 18 of the transcript herein.

John Arthur Boyd, petitioner and appellant herein, filed his petition for a writ of habeas corpus (Tr. 2), contending that the sentence in Cause No. 40011, as aforementioned (Tr. 10-11), was void and unlawful for uncertainty, as more fully shown by the certified copies of the judgment and sentence in said cause which were attached to the petition for the writ.

It is further alleged in said petition that Boyd had served the full time required of him by law to sat-

isfy the sentences in Cause No. 40011 and Cause No. 11630, and that he is entitled to release of a part of his sentence by reason of his good behavior, and that by reason of the laws of the United States petitioner Boyd, appellant herein, has served more than thirty days additional, and is, therefore, entitled to his immediate discharge from the United States Penitentiary at McNeil Island where he is now incarcerated by virtue of commitments issued pursuant to judgments in the criminal causes aforesaid. Certified copies of the sentences, commitments and Marshal's return on commitments in the two cases in the Western District of Washington, and in the case in which the appelant was sentenced in 1923 in the United States District Court for the District of Oregon, are attached to appellant's petition for writ of habeas corpus and made a part thereof. (Tr. 5-18, incl.)

Pursuant to the petition the lower Court entered an Order to Show Cause (Tr. 19) directing the appellee herein to appear before it and show cause why the writ should not issue as prayed for by the appellant. Appellee appeared on the required date and demurred to the petition of the appellant upon the ground and for the reason that the same failed to state facts suf-

ficient for the granting of the relief prayed for therein. (Tr. 20) The appellee's demurrer was sustained, and the appellant, refusing to plead further, his petition was denied and an exception noted in his behalf. (Tr. 22)

It is from the order sustaining appellee's demurrer to appellant's petition for a writ of habeas corpus, and denying the petition for the same, that the appellant is now prosecuting this appeal.

ARGUMENT

The sole issue to be determined, it would seem, is whether or not the sentence in Cause No. 40011 (Tr. 10-11) is indefinite and uncertain as to its requirement that the period of time mentioned therein run consecutively with and in addition to the sentence theretofore imposed in a former cause, and is, therefore, because of said uncertainty and indefiniteness, null and void.

It is contended by the appellant that the sentence in said cause is void due to the fact that it does not specify with sufficient particularity the former cause and period of time with which the sentence in Cause No. 40011 is to run consecutively and not concurrently, and is further null and void due to the fact that the sentence in Cause No. 40011 does not specify with sufficient definiteness or particularity the logical sequence or order in which the sentences in Cause No. 40011 and Cause No. 11630 are to be served.

It is also contended by the appellant that inasmuch as the commitment in Cause No. 11630 provides for the imprisonment of the defendant Boyd until his

fine is paid, or until he is discharged by law, when the sentence upon which said commitment is predicated does not so provide, that the entire sentence in Cause No. 11630 is void.

THE SENTENCE IN THE SECOND CASE (No. 40011) IS SUFFICIENTLY DEFINITE AND PARTICULAR AS TO REQUIRE SENTENCES TO RUN CONSECUTIVELY.

It is the contention of the Government that the commitment in Cause No. 40011 (Tr. 13) must be construed along with the sentence in said cause. (Tr. 10)

It will be noticed that the commitment shows that the defendant was to be imprisoned for the period of fifteen months, to run consecutively with and in addition to the sentence imposed in Cause No. 11630, while the sentence on which said commitment is based does not describe the number of the case with which the sentence in Cause No. 40011 is to run consecutively and not concurrently.

However, it is the contention of the Government that the commitment in Cause No. 40011 should be construed together with the judgment and sentence,

and an interpretation of the judgment and the commitment construed together lead to the unavoidable conclusion that it was the intention of the Court below, in Cause No. 40011, to require the defendant Boyd to serve fifteen months at the expiration of the penitentiary sentence meted out in Cause No. 11630, and that the sentence in the second case (No. 40011) was to run consecutively and not concurrently with the sentence in the first case and was to be, in fact, in addition thereto. The Marshal's return on the commitments in the first and second cases (Tr. 10, 14) shows that the defendant, appellant herein, in pursuance of said commitments, was delivered to the keeper of the United States Penitentiary at McNeil Island on the same day, to-wit, March 15, 1929.

In *Ex Parte Lamar*, 274 Fed. 160, it was held by Circuit Judge Manton, that where a sentence was somewhat ambiguous as to whether certain terms of imprisonment were to be served consecutively or concurrently with a prior sentence, that resort might be had to the commitment issued pursuant to the sentence, in order to explain away the ambiguity. On page 172 of the Court's opinion it was stated:

"After conviction on the conspiracy charge, the petitioner was returned to the Atlanta penitentiary, where he served out the balance of his term under the conviction for impersonating a federal officer. It is contended by him that, while so doing, he served the term which was imposed upon him on the conviction of the conspiracy charge. The argument is that the term of one year as his sentence on the conspiracy charge ran concurrently with the term imposed on the charge of the crime for impersonating a federal officer. There are two records which disclose what took place at the time sentence was imposed: First, the criminal minutes kept by the clerk in his minute book and the commitment paper which issued and upon which the prisoner was incarcerated. The criminal minutes kept by the clerk provide a memorial for the future record for the court of what took place at the time of sentence. The commitment serves another purpose. The purpose and object of this record is, first, to record accurately the judge's terms of the sentence; second, to advise the prisoner what penalty is imposed so that he might make amends to society accordingly; and, third, to advise the jailor so that he might keep the prisoner and require the fulfillment of the sentence so imposed."

Further in said opinion, on page 176, the Court said as follows:

"Is the sentence which was imposed by Judge Cushman definite and certain? Is it such as a defendant may readily understand and be capable of performing? I think all that is found in the commitment paper must be read and

applied. Servitude in the United States penitentiary at Atlanta did not answer the requirement to serve one year in Mercer county jail in New Jersey. The petitioner could not serve the term fixed for Mercer county jail until after he finished his term at Atlanta, Ga. The criminal minutes bear out the indorsement at the bottom of the commitment paper. It is there clearly expressed that the judge fixed the commencement of service after the expiration of Lamar's term at Atlanta. No authority supports the claim that Judge Cushman was prohibited from fixing the date of the commencement of this term to such future date. To hold otherwise would be making a mockery of the law, and to stultify the course of justice."

The decision in the *Lamar* case, supra, would seem to be authority for the Government's contention that the pleadings in a case, and in some instances extraneous evidence, may be resorted to to aid in construing a judgment in a criminal case.

To the same effect see *Fredericks vs. Snook*, 8 Fed. (2d) 966.

The language of the sentence should be given its ordinary legal meaning and should be construed so as to give effect to the intention of the judge who imposed it if possible. *Fredericks vs. Snook*, supra.

So construed, it is clear that it was the intention of the Court below in the second case (No. 40011) to

impose a term of imprisonment to run consecutively and not concurrently with the term of imprisonment meted out in the first case (No. 11630).

In *Rice vs. U. S.*, 7 Fed. 319, (9th C. C. A.) it was held that sentences on two counts, to run consecutively, imposed successive and not concurrent sentences. In the *Rice* case the defendant was sentenced to imprisonment for six months on the first count and six months on the second count, "said judgments to run consecutively." This Court held, in the *Rice* case, that it is well settled that a defendant convicted of more than one violation of Federal law may be sentenced to two or more terms of imprisonment, these terms to follow each other.

Speaking of the case of *Puccinelli vs. U. S.*, 5 Fed. (2d) 6, (9th C. C. A.), cited by appellant herein, this Court, in its opinion in the *Rice* case, stated as follows:

> "In his opinion in that case Judge Rudkin said:
>
> > " 'Where sentences are imposed on verdicts of guilty or pleas of guilty on several indictments, or on several counts of the same indictment, in the same court, each sentence begins to run at once and all run concurrently, in the absence of some definite, specific provision that the sentences shall

> run consecutively, specifying the order of sequence.' This is a correct statement of the law, but the sentences imposed on appellant were passed separately, and we think it sufficiently appears that they were to be served consecutively in the order in which the sentences were passed.

The present proceedings being a collateral attack on the judgment of a court of general jurisdiction, and raising highly technical questions, the doctrine announced in the reported cases cited by the appellant herein should not be extended. *Rice vs. U. S.*, supra.

In *Alvarado vs. U. S.*, 9 Fed. (2d) 385, (9th C. C. A.) it was contended by the appellant that the sentence was jurisdictionally defective. The sentence was in the following form:

> "Ordered that defendant, Paul Alvarado, for offense of which he stands convicted, as to counts 1 and 2 be imprisoned for period of three years and pay a fine in sum of $1,000, and as to counts 3 and 4 to be imprisoned for period of three years and pay a fine in sum of $1,000, said judgments of imprisonment to run consecutively."

This Court, however, approved the judgment and affirmed the same, stating that the sentence therein was in substantially the same form as approved by this Court in *Rice vs. U. S.*, supra.

In *U. S. vs. Daugherty*, 269 U. S. 360, the judgment and sentence was in the following form:

> "It is by the court considered and adjudged that said defendant is guilty of the crime aforesaid, and that as punishment therefor said defendant be confined in the United States Penitentiary situated at Leavenworth, Kansas, for the term of five (5) years on each of said three counts and until he shall have been discharged from said Penitentiary by due course of law. Said term of imprisonment to run consecutively and not concurrently."

It was contended by the defendant that the sentence was for five years only, and that the order in fenses was to be served was not clearly designated. The was to be served was not clearly designated. The terms were, according to his contention to be served concurrently, and the defendant could not, he contended, be held in further confinement under the sentence after the expiration of the longest term imposed. But the Supreme Court of the United States in overruling defendant Daugherty's contention stated as follows in its opinion:

> "Sentences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who must execute them. The elimination of every possible doubt cannot be demanded. Tested by

this standard the judgment here questioned was sufficient to impose total imprisonment for fifteen years made up of three five-year terms, one under the first count, one under the second and one under the third, to be served consecutively and to follow each other in the same sequence as the counts appeared in the indictment. This is the reasonable and natural implication from the whole entry. The words, 'said term of imprisonment to run consecutively and not concurrently,' are not consistent with a five-year sentence."

In *Austin vs. U. S.*, 19 Fed. (2d) 127, (9 C. C. A.) it was shown that the lower court imposed upon the appellant imprisonment in the United States Penitentiary on each of two counts for the term of four years, "sentences to begin to run upon the expiration of the sentence now being served by the defendant." It was contended that the sentence was erroneous in that the trial court had no authority to suspend or postpone the operation of a sentence for a definite or indefinite period of time, but had authority only to impose a sentence to operate from the date of the arrival of the accused at the penitentiary, or from the date of judgment.

This Court in the *Austin* case said:

"In the present case, the judgment providing that imprisonment should begin at the

expiration of a sentence that precedes it, accords with recognized practice, and it cannot be said to be void for uncertainty since it is as certain as the nature of the matter will permit. 16 C. J. 1306; *Howard vs. U. S.*, 75 Fed. 986."

In *U. S. vs. Carpenter*, 151 Fed. 214, (9th C. C. A.), the petitioner plead guilty in the lower court and was sentenced upon the first three counts

> "to be imprisoned at hard labor for the term of two years for the offense charged in the first count of the indictment, and for a further term of two years thereafter for the offense charged in the second count of said indictment, and for the further term of two years thereafter for the offense charged in the third count of said indictment, and that he be committed until his sentence be performed, or until he be discharged according to law."

It was held that even though the sentence for the second or middle term is void, that the defendant was not for that reason entitled to be discharged at the expiration of the first term, but in such case the sentence on the third term begins at once on the expiration of the first. In its opinion the Court said:

> "But we are of the opinion that the court below erred in discharging the petitioner. Conceding that the sentence upon the second count was void, the imprisonment under the third count

should begin immediately upon the expiration of the sentence imposed upon the first. *Kite vs. Commonwealth*, 11 Metc. (Mass.) 581, 585; *Ex parte Jackson*, 96 Mo. 116, 119, 8 S. W. 800. In the case last cited the court said:

" 'The only point, therefore, left for discussion, is this: Whether the prisoner, having been sentenced at the same term of court to three successive terms of imprisonment in the penitentiary, having reversed the judgment and sentence of imprisonment pronounced against him as to the second or middle term, and served out his sentence as to the first term, is entitled to be discharged from serving out his third or last term. To this point the response must be in the negative, and for these reasons: The judgment upon which the prisoner's second term of imprisonment was dependent having been reversed, the case stands here precisely as if he had served out his second term or had been pardoned as to the offense for which that sentence was imposed, and so his third term of sentence lawfully began upon the expiration of his first term.'

"That the sentence on the third count was lawfully imposed there can be no doubt. That count charged the alteration of a money order with intention to defraud the United States. It is true that the time when the alteration is charged to have been made is the same date on which the money order described in the first count was alleged to have been altered; but it is none the less a separate and distinct forgery punishable under

a separate indictment. 'Although several drafts may be uttered as one indivisible act, the forgery of each is a separate offense.' 19 Cyc. 1411; *Barton vs. State*, 23 Wis. 587.

"There can be no doubt that the United States District Court for the District of Oregon intended to impose cumulative sentences upon the petitioner. We discover no fatal defect in the language of the sentence, rendering it uncertain when the term of imprisonment on the third count shall begin; but, if there were such a defect, we are of the opinion that it would have been the duty of the court below to have afforded the court which imposed the sentence an opportunity to correct the same before discharging the petitioner upon a writ of habeas corpus. *Ex parte Peeke* (D.C.) 144 Fed. 1016, and cases there cited."

Furthermore, Judge Webster, when sentencing defendant Boyd in the court below, could take no judicial cognizance of the sentence in Oregon. (Tr. 15-16) He could, however, when imposing the sentence in the second cause (No. 40011), take judicial cognizance of the former sentence of his court, to-wit, the sentence in the first case (No. 11630).

Furthermore, assuming for the purpose of argument, that the court below had before him the question of whether or not the sentence in Cause No. 40011 should run consecutively or concurrently with the sentence of the United States District Court for Oregon,

it must be assumed by this court that the sentences in the first and second cases only, No. 11630 and No. 40011, were the only ones under consideration by the court below, inasmuch as the record shows that the sentence in the Oregon case has been fully satisfied. (Tr. 18)

It will be conceded by the Government, in view of the decision of this Court in *Wagner vs. U. S.*, 3 Fed. (2d) 864, (9th C.C.A.) and considering that the Court in Cause No. 11630 has failed to provide that the defendant should stand committed until his fine is paid, he may not as a poor convict be imprisoned for the period of thirty days as a result of the imposition of said fine, but the sole remedy of the government for the collection of the same is by civil execution. However, it may be admitted by the government that when Boyd, the appellant herein, has served his entire sentence of 30 months, or when the same has been decreased by good time allowances, he is entitled to a writ of habeas corpus to obviate the necessity of his serving the thirty days required of a poor convict, who is sentenced to stand committed until his fine is paid. Inasmuch as any such provision is absent from the judgment imposed in Cause No. 11630, as above stated, it may be ad-

mitted, in view of the *Wagner case*, that the Government's only remedy is by civil process for the collection of the fine. However, this purported or alleged defect in the commitment in Cause No. 11630 (Tr. 5-6) does not nullify or invalidate the entire judgment and sentence in that cause as alleged, but only that portion of the same which is erroneous, to-wit, the provision in the commitment that the defendant shall stand committed until his fine is paid.

It is elementary that where a Federal Court exceeds its authority in the imposition of a sentence in excess of what the law permits, where the Court has jurisdiction of the person and the offense, the imposition of the same does not render the authorized portion of the sentence or commitment void, but only that portion of the commitment or sentence which is in excess.

Dodge vs. U. S., 258 Fed. 300,
Carter vs. Snook, 28 Fed. (2d) 609,
U. S. vs. Holtz, 293 Fed. 1019,
U. S vs. Peeke, 153 Fed. 166.

In view of all the foregoing, it is respectfully submitted that the trial court did not err when it sustained appellee's demurrer to the appellant's petition for a writ of habeas corpus; and, further, that the

court below was not in error when, upon sustaining said demurrer, and the appellant proceeding no further, it denied the petition for a writ of habeas corpus filed by the appellant.

Respectfully submitted,

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